

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

----- )  
JAMES JENKINS, on behalf of )  
himself and all other similarly )  
situated individuals )  
v. ) Criminal No.  
EQUIFAX INFORMATION SERVICES, LLC ) 3:15CV443  
June 14, 2016  
----- )

COMPLETE TRANSCRIPT OF HEARING  
BEFORE THE HONORABLE M. HANNAH LAUCK  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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1           (The proceedings in this matter commenced at  
2 10:40 a.m.)

3  
4           THE CLERK: Civil action 3:15CV443, James  
5 Jenkins, et al. versus Equifax Information Services,  
6 LLC.

7           Mr. Leonard Bennett, Ms. Kristi Kelly, and  
8 Ms. Lauren Brennan represent the plaintiffs. Ms.  
9 Phyllis Sumner represents the defendant.

10          Are counsel ready to proceed?

11          MR. BENNETT: The plaintiffs are, Your Honor.

12          MS. SUMNER: Yes, Your Honor. Thank you.

13          THE COURT: Thank you.

14          MR. BENNETT: Good morning, Your Honor. May  
15 it please the Court:

16          We're here today to ask the Court to  
17 preliminarily approve a proposed class settlement  
18 negotiated on behalf of a putative class of nationwide  
19 consumers who allege that Equifax, a consumer  
20 reporting agency, violated 15 U.S. Code 1681g(a),  
21 which requires a consumer reporting agency to fully  
22 identify the sources of its information.

23          In this case, Your Honor, the source of the  
24 information that was challenged was LexisNexis, a  
25 private vendor, that reported the public record

1 information in consumer credit reports.

2           The class is gigantic. It would consist of  
3 everyone during the statute of limitations period who  
4 requested a copy of their consumer file. It would be  
5 anywhere between one and two and a half million by our  
6 estimations - two million is the rough estimate I'll  
7 use in this discussion - which means that a class  
8 action that proceeded to seek money damages for a  
9 willful violation of the Fair Credit Reporting Act  
10 would entitle consumers, if we were successful, to  
11 somewhere between \$200 million at a minimum at \$100 a  
12 class member to \$2 billion, which would dwarf the net  
13 worth of this company. And, of course, that's not  
14 counting putative damages.

15           In this case, that caused us to shift from  
16 our customary common fund method of negotiating to one  
17 that focused on correcting the problem. It meant  
18 because we expected in the negotiation we would not be  
19 able to force a cash fund for class members the class  
20 members should not have to give up their claims.

21           In this case, we faced - I say this not just  
22 publicly now that we've shaken hands, but beforehand  
23 as well - as formidable a defense team as we can.  
24 The Equifax defense lawyers know the weaknesses. They  
25 know the challenges. They knew the challenges. They

1 pressed the buttons in the settlement discussions  
2 regarding the proof of willfulness, the fact that the  
3 breadth of the class, and the fact that Equifax --  
4 shifting to the carrot and the stick, the carrot  
5 arguments from Equifax were: This would fix the  
6 problem. This would give consumers actual monetary  
7 value in the form of, as I'll detail in a moment, the  
8 credit monitoring, the retail product, and this would  
9 serve as the catalyst for industry change both in the  
10 courtroom, as we are suing Equifax's competitors for  
11 the same class, essentially, as well as in industry  
12 practice.

13 That caused us -- it certainly didn't short  
14 circuit our negotiation cycle. We had multiple  
15 mediations both before retired Eleventh Circuit Judge  
16 Birch and directly before we could agree on much of  
17 anything. The settlement agreement was negotiated  
18 down to the last word, the letter, the notice, the  
19 choice of administrator. That's a broad conclusion.

20 The summary of the case, Judge, is that this  
21 is a settlement that would not release anything other  
22 than the ability to bring this specific claim on a  
23 class basis. It would pay every single class member  
24 18 months of a product that is retail sold, not  
25 contrived, for roughly \$15, and it would reform

1 Equifax's reporting and disclosure practices so that  
2 every consumer who gets a report going forward would  
3 know the source of that information. It's an  
4 important term because the source of the information  
5 has its own set of responsibilities. LexisNexis is  
6 liable under different sections of the Fair Credit  
7 Report Act, that consumers can contact the vendor who  
8 may have mistakenly reported a judgment as  
9 unsatisfied. A bankruptcy -- in my case, I had  
10 TransUnion reported a bankruptcy on Leonard Bennett's  
11 credit report ages ago. Michael C. Bennett, a  
12 gentleman, a lawyer up in Pennsylvania. And certainly  
13 the firms that represent the putative class here,  
14 Judge, have represented, besides Leonard Bennett,  
15 countless, hundreds, thousands of consumers in an  
16 individual basis who had public records that were  
17 inaccurately attributed to them.

18           It would empower consumers. Even if we get  
19 to fairness and the Court denies approval, every class  
20 member will have been told in this process by a notice  
21 of the fact pattern that's at issue here so that every  
22 class member will now know, all these individuals who  
23 requested their file, that LexisNexis was the real  
24 source of the public records at issue in the case.

25           At this stage, of course, Judge, there's no

1 opposition. The standard of preliminary approval is  
2 low, but the basic law requires the Court to agree  
3 that the case can be certified.

4 Typically, on preliminary approval or any  
5 settlement approval of a class, the Court emphasizes  
6 or looks at the Rule 23(a) factors, numerosity,  
7 commonality, typicality, and adequacy the same way  
8 Your Honor would look at it if it was contested. But  
9 the law is that the 23(b)(2) or 23(b)(3) elements  
10 are -- the Court has more flexibility so that we don't  
11 need to prove that we can manageably present the  
12 evidence at trial, for example.

13 We do need to prove that the class is  
14 numerous. It is. It's millions. We do need to prove  
15 that there are common issues. And here the claims are  
16 common. The allegation of the incorrectness of the  
17 source, the failure to disclose it, the allegation  
18 that this was illegal under 1681g(a), and that the  
19 conduct was willful on all common issues. We've cited  
20 some of the cases; *Dreher v. Experian*, *Soutter v.*  
21 *Equifax*. The law in this district is pretty well  
22 established there.

23 Typicality. The Fourth Circuit's decision in  
24 *Soutter* that initially reversed and remanded before  
25 Judge Payne held that you need to explain that we need

1 to have facts that establish the named plaintiffs'  
2 claims that are typical of those of the class. And  
3 that's very simple here. Requested the file. Had a  
4 public record in it. The source, LexisNexis, was  
5 withheld or not disclosed. The fact pattern here, the  
6 facts to establish the named plaintiffs' claims, are  
7 typical of those for the class.

8 Inadequacy. All of these plaintiffs have  
9 been with us for quite a long time, even before we  
10 filed the cases. This was a project that's been going  
11 on for a while. They have been responsive. They  
12 vetted and actually approved the specific settlement  
13 before we could negotiate its terms to completion.

14 The counsel in this case, I have and my firm  
15 has considerable experience in this court and  
16 otherwise, but behind me also sit, Your Honor,  
17 attorneys for two of the three best Fair Credit  
18 Reporting Act firms in the country. If I can  
19 introduce Lauren --

20 MS. BRENNAN: Good morning, Your Honor.

21 THE COURT: Good morning.

22 MR. BENNETT: -- who is with Francis &  
23 Mailman. Was my business rival for quite some time  
24 until now we've decided it's better to help class  
25 members together, but in Philadelphia they have been



1 doing this as long and as effectively as we have. If  
2 the jurisprudence out there is not ours, it's theirs.

3 The fact pattern for this case began ages ago  
4 in a case styled *Dennis v. TransUnion*. That was their  
5 win.

6 Your Honor has already, I think, met Kristi  
7 Kelly, who is winning all kinds of accolades and  
8 quickly pushed Consumer Litigation Associates out as  
9 the big firm in Virginia. We're now the old graying  
10 guy who hopes that she'll keep us around.

11 There is no comparable team, without  
12 exaggeration, I could have put together that would be  
13 as effective at litigating these cases, and I think  
14 that that certainly, both the unity and the  
15 competence, satisfies adequacy, and it's proven by the  
16 fact that we are able to negotiate this particular  
17 deal.

18 We've proposed a class notice. We have tried  
19 to reduce some expenses here, but the notice, as we  
20 discussed at a 16(b) status update, Your Honor, is a  
21 hybrid notice where we will send to electronically  
22 verified email addresses. A number of individuals  
23 requested their file and communicate with Equifax via  
24 Internet and using a communication domain that will  
25 avoid spam blocks and that will show as an Equifax

1 associated communication the way that the previous  
2 communications with the class member took place.  
3 That's a percentage. That's a minority. A  
4 significant percentage but a minority of the class  
5 members. And the others, we actually have a direct  
6 notice plan. And that's expensive given the size of  
7 the class, and that was a big hold up that held us up  
8 from getting to Your Honor our proposed settlement  
9 terms on our original schedule.

10 Either way, it's direct notice. We are not  
11 relying on a one-inch ad in the back of a *USA Today*  
12 newspaper. And we have a top flight class  
13 administrator that will run the settlement.

14 The data from Equifax as to class members is  
15 pretty airtight. Frankly, when you sue a company such  
16 as Equifax, that's the source for a lot of the credit  
17 header information, the identifying information that  
18 if we were to sue Bank of America, we would rely on.  
19 That is, the class administrator would buy from  
20 Equifax class member, credit header, or credit history  
21 information, identifying information.

22 In this case, we have it directly from the  
23 CRA's mouth, so to speak. And so the notice will be  
24 as effective as possible and will certainly satisfy  
25 Rule 23(c).

1           The release is narrow. We don't yet have to  
2 convince Your Honor that the ungodly amount of  
3 attorneys' fees that we always seek are justified, but  
4 we will. I can answer questions about that, but we  
5 will brief it substantially after class members have  
6 had a say, unless the Court suggests otherwise. And,  
7 of course, this is an amount that the Court has to  
8 approve. It was negotiated after settlement.  
9 Entirely after settlement. And it is only paid by  
10 Equifax, which in *Berry v. LexisNexis*, the Fourth  
11 Circuit, as well as this court with Judge Spencer,  
12 found appropriate and important.

13           I don't have any other questions for Your  
14 Honor unless you have any questions for me.

15           THE COURT: I do have questions. I just want  
16 to be clear. You have submitted this proposed class  
17 both under (b)(2) and (b)(3). The proposed order,  
18 which is always helpful for me to review, suggests  
19 only a (b)(3) certification, and I really want to hear  
20 from both of you about exactly what you're seeking and  
21 why, which class you think is most appropriate to  
22 certify under and why.

23           MR. BENNETT: Your Honor, as a practical  
24 matter, it is because one lawyer made the final edits  
25 in one document and not in the other. That's me. And

1 so I did not add the 23(b)(2) term into the proposed  
2 order, and I would ask to be able to do that. It's a  
3 mistake that I have only now learned that I committed.

4 THE COURT: So you're seeking certification  
5 under both?

6 MR. BENNETT: Under both. But it's  
7 unnecessary to seek it under both. The biggest  
8 difference between a 23(b)(2) and (b)(3) from a  
9 practical standpoint is the ability to opt out and the  
10 need for direct notice. And the law is that with Rule  
11 23(b)(2) settlements you don't have to provide an opt  
12 out. It doesn't violate due process because it is  
13 injunctive relief that affects the class as a whole,  
14 and it is, in addition to that, direct notice,  
15 therefore it's not important because there's no need  
16 to opt out. The direct notice is cosmetic.

17 That doesn't mean the Court in a 23(b)(2)  
18 settlement will always conclude that. I could bring a  
19 23(b)(2) pure injunction settlement hearing. Your  
20 Honor could say, "I want notice," and you're right  
21 down the middle of the plate with case law. The same  
22 is true with the right to opt out. You do not have to  
23 have them, but you can have them.

24 In this case, there is a right to opt out and  
25 there is direct notice. But the injunction is also a

1 big part of what we do. If the Court decides that we  
2 don't need a 23(b)(2) component to it, then we don't  
3 need it. It doesn't add the same effect as it does --  
4 it doesn't change anything for class members.

5 What it does from a legal standpoint is it  
6 means that if class certification were contested or  
7 either sua sponte by the Court or by an objector or  
8 intervenor that the standard for certification of a  
9 23(b)(2) settlement is different than a standard of  
10 certification of a 23(b)(3).

11 Now, with that said, this is clearly  
12 predominately a Rule 23(b)(3) settlement because you  
13 have a payment being made, albeit not in pennies,  
14 dollars, but in the form of the credit monitoring  
15 retail product. You have that payment being made to  
16 class members. You have a release, as modest as it  
17 is, that is your ability to bring this specific claim  
18 in a class basis again of some nature.

19 The Court in *Berry v. LexisNexis* held that  
20 the injunctive relief settlement released statutory  
21 damages, and that's not this case because here even  
22 those aren't released. If even in that case, which  
23 was much more of an imposition on class members, that  
24 the Court could certify a Rule 23(b)(2) settlement  
25 despite that there was no right to opt out and despite

1 that direct notice was imperfect. It was publication  
2 in that case.

3 It probably doesn't get us to an end point,  
4 Your Honor, but we believe it's predominately a  
5 23(b)(3) settlement but that the Court could also  
6 certify it if it elected under Rule 23(b)(2).

7 THE COURT: Right. It seems a bit of a  
8 hybrid, I think.

9 MR. BENNETT: It does, Your Honor.

10 THE COURT: So certification under both would  
11 not be inappropriate in my mind, but I wanted to be  
12 clear that you weren't sort of hedging your bets  
13 because the way that your notice or your preliminary  
14 approval motion says it could be one, it could be the  
15 other. It wasn't clear to me you were seeking both.

16 MR. BENNETT: Yes, Your Honor.

17 THE COURT: So you just indicated it's clear  
18 in your papers that there's no monetary payment, and I  
19 think you just said it was \$15, but it's for the  
20 credit monitoring.

21 MR. BENNETT: Correct.

22 THE COURT: And it's \$15 a month, right? So  
23 it's \$270 total.

24 MR. BENNETT: Yes, Your Honor.

25 THE COURT: Okay. So that's the cash

1 equivalent of what the consumers would be receiving.

2 MR. BENNETT: Yes, Your Honor.

3 THE COURT: And I'm aware that there's no  
4 individual release of claim and that your firm has  
5 committed to making your number, or your firms, I  
6 guess, my apologies, have committed to making  
7 yourselves available by contact information through  
8 the notice process or otherwise?

9 MR. BENNETT: Yes, Your Honor.

10 THE COURT: And so I guess I want to be  
11 clear, have the parties discussed representation with  
12 respect to an individual claim? Are there any  
13 potential issues there? I know that Equifax would  
14 never say you can't represent an individual claimant,  
15 but I want to be sure that we don't have any potential  
16 issues down the way that I should be aware of in any  
17 form.

18 MR. BENNETT: There is no secret contract.  
19 If I can step back, the big issue in terms of Virginia  
20 ethics, which is what I live mostly by, there's no  
21 restriction on restricting yourself from solicitation.  
22 There are restrictions, as the Court is aware, on  
23 committing not to represent people.

24 There is one niche, and it's really Virginia  
25 specific. It's our specific rule that if the Court

1 approves a prohibition on suing, and it gives an  
2 example of a mass or collective action as part of a  
3 settlement process, then we can do that. We've not  
4 agreed here.

5 With that said, to give the Court, at least  
6 on the record, background is all of our firms every  
7 day select who we will represent and who we will sue.  
8 Equifax, I can't understate, well, I can't overstate.  
9 I can't overstate how significant I think it is from  
10 our perspective that Equifax stepped up, acknowledged  
11 the problem, worked to resolve it, didn't like to  
12 resolve it, but did, and the effect it will have on  
13 other class members with respect to TransUnion,  
14 Experian, and getting the reports fixed.

15 The way that my firm, I know this is true  
16 with my colleagues as well, is when consumers contact  
17 us, we will inform them of their rights. If they have  
18 a claim, we will take that case. We will not be  
19 farming those or trying to build new cases against  
20 Equifax from these people, but when it comes in, it  
21 comes in.

22 But every day, Your Honor, there are cases  
23 that don't have a docket number on them where we solve  
24 their problem or obtain a cash settlement for the  
25 consumers.



1           From our perspective -- I mean, my  
2 understanding is that I will have shaken my  
3 colleague's hand and say that we will treat your  
4 client fairly, and well, and this is not a business  
5 venture for us here. This is not the purpose of this.

6           And I can tell the Court that whenever we  
7 have done, and we do it with almost all of these, when  
8 my firm is a contact point, it shuts us down when we  
9 have had large classes like this. And so we have  
10 everybody who works for me, we divide up between  
11 individual law firms, almost all our time is spent  
12 answering questions, helping people, telling them how  
13 to make disputes and the like. So we expect that we  
14 will be a really well paid, if we're effective, group  
15 of class action firms on fairness approval and  
16 Virginia's best darn pro bono firm hereafter for quite  
17 sometime. It evens out. That's part of our job as  
18 part of that big overpay if we get that way.

19           In this case, Your Honor, I know that doesn't  
20 answer the questions. It's sort of squishy, but it's  
21 sort of where we are. There's not a secret plan.

22           THE COURT: Right. Well, I just want to be  
23 sure that, you know, it does -- I can tell the amount  
24 of work that everybody has put into this settlement.  
25 And so I'm aware that any time this kind of injunctive

1 relief, certainly when educated by your papers,  
2 involves a changing of what kind of information a  
3 consumer gets, I presume, without knowing, that that's  
4 a major business change and a costly one on behalf of  
5 Equifax, in this instance, because often those kinds  
6 of changes require computer system changes. That may  
7 not be the case here, and I'll ask you, Ms. Sumner, to  
8 address that. But I'm aware that when any company is  
9 involved in large collecting and disseminating large  
10 amounts of information, when you change how the  
11 information is given or taken in, it is generally  
12 costly.

13           So I am presuming that your settlement  
14 negotiations didn't just include what I am seeing here  
15 but a significant amount of background work about how  
16 those systems would change. And you can disabuse me  
17 of that notion.

18           So, really, I just want to -- I have reviewed  
19 everything that you have, and I think it is very well  
20 put together, but I want to be sure that I cover  
21 anything that may be a potential issue.

22           I also want to educate myself a bit. I'm  
23 aware about the *Dennis* case because you all referred  
24 to it. What is the status of the *Dennis* case?

25           MR. BENNETT: The *Dennis* case was stayed for

1     *Spokeo* and is no longer stayed.

2             It is still?

3             MS. BRENNAN: Your Honor, it's no longer  
4     stayed. We would file a motion for class  
5     certification.

6             THE COURT: Okay.

7             MR. BENNETT: The firms that you see here are  
8     also now working in *Dennis* and vice versa. The Court  
9     has two cases, the *Clark* cases, with respect to  
10    Equifax's competitors. One of those with Experian.  
11    Experian wants to go to mediation as soon as we can  
12    get dates, and we are already setting dates. And the  
13    other unnamed entity thinks *Spokeo* is a silver bullet,  
14    and we are trying to find a way to disavow of that  
15    self confidence before too long. But I suspect in  
16    that other case, the *Clark v. TransUnion* case, the  
17    plan is a very rapid, as you will learn shortly, that  
18    we plan a very rapid, and the defense knows this,  
19    motion for class certification process just as *Dennis*  
20    handles their narrow geographic area and *Clark* handles  
21    ours.

22             THE COURT: All right.

23             MR. BENNETT: So you won't be done with this  
24    stuff unfortunately for quite some time.

25             THE COURT: I just want to be clear. I know

1 we will deal with fees in the future, but you've  
2 suggested an amount, which is significant, and I want  
3 to be clear that you all have been careful. I guess I  
4 want to be clear that it's on the record how you all  
5 have been careful about separating fees amounts to  
6 related cases.

7 So I think you suggest that the amount  
8 they've agreed upon has been 2.8 million.

9 MR. BENNETT: Yes, Your Honor.

10 THE COURT: And so I want to be sure that as  
11 you're putting that information together, that the  
12 Jenkins fees are the Jenkins fees and the Dennis fees  
13 are the Dennis fees, and that you all have been  
14 careful about that.

15 MR. BENNETT: We have. And we'll be even  
16 more so moving forward as we get to the fairness  
17 hearing and the motion for approval of a fee award  
18 for not just in this case, but in Dennis and in Clark,  
19 if we ever get to the stages there.

20 Behind the scenes, we refer to it as the  
21 *Equifax-Dennis* case, and it's been some time that all  
22 of our firms have been finding reps, getting reps,  
23 putting together the case, and the evidence. But I  
24 think it is fairly easy to differentiate the time  
25 spent on this.

1           THE COURT: I'm sure it is. I just want to  
2 be sure it's on the record, especially because you're  
3 referring to these cases as you talk to me about this  
4 one, and obviously I think some of the information  
5 overlaps what you're talking about and discovering in  
6 other issues.

7           All right. So I think those are the  
8 questions that I have of you, Mr. Bennett.

9           MR. BENNETT: Yes, Your Honor.

10          THE COURT: I'd love to hear from Ms. Sumner.

11          MS. SUMNER: Good morning, Your Honor.

12          Phyllis Sumner on behalf of Equifax.

13                I appreciate you allowing me to appear today  
14 without Mr. Montgomery, who would normally be here as  
15 local counsel. He had a conflict today.

16                We did put in a lot of time and effort, as I  
17 think is clear from the papers. I would like to  
18 mention, and I think I said this to you before,  
19 obviously we have had a dispute about whether or not  
20 this conduct was a violation of the FCRA. We are  
21 talking about public records. What we would consider  
22 to be the source would be the courts or the government  
23 entity from which those records came. The dispute  
24 really was about whether or not there should be a  
25 disclosure as to the vendor that was retrieving those

1 records from those public sources. And, of course,  
2 here in most instances that would be LexisNexis.

3 Ultimately, after much discussion, both  
4 informally amongst the lawyers as well as in lengthy  
5 mediations, we agreed to essentially change an  
6 industry practice. Because, as you know, this is not  
7 Equifax alone, this impacts the way that the national  
8 credit reporting agencies report public records.

9 And so Equifax did step up and agree to make  
10 a change that would ultimately impact the industry in  
11 the way that this information is reported.

12 The company also felt in an effort to be as  
13 transparent as possible to consumers and to improve  
14 the consumer experience that it would disclose not  
15 only the source being, for example, a courthouse, but  
16 also that LexisNexis was the vendor who obtained those  
17 records.

18 And you're right, it is an operational  
19 change, and when we are talking about a change that  
20 potentially impacts disclosures to millions of  
21 consumers, it is not a task that goes without a lot of  
22 vetting. And Equifax does take a look at that to see  
23 if it would create other problems because oftentimes  
24 what seems like an easy solution to what appears to be  
25 a problem can create other problems. Hopefully, that

1 will not be the case here once this actually takes  
2 place and those consumers will receive the disclosures  
3 that have this additional information. But it was a  
4 big change for the company, and we did agree to be the  
5 first to make this change as part of this resolution,  
6 and in addition to offer to the consumers the credit  
7 monitoring product which allows them to take  
8 additional steps.

9           We don't believe that this is the case that  
10 ultimately would result in a lot of individual cases  
11 because we don't think it is a case where there are a  
12 lot of individual damages that would come at issue,  
13 but as part of the negotiations we agreed to separate  
14 that out and to leave that option to consumers. They  
15 will obviously receive the notifications either by  
16 email or by direct mail, and they through that process  
17 will understand what we are doing and that they have  
18 additional opportunities, if they so chose.

19           And I think, Your Honor, that primarily  
20 answers the questions. I did want to say that with  
21 respect to the attorneys' fees, we separately  
22 negotiated all of the aspects of the settlement  
23 agreement before even broaching that issue, and then  
24 when we discussed the fees, we also discussed that  
25 informally and through the mediation process.

1           So we had Judge Birch's assistance in working  
2 through that process as well, which ultimately got us  
3 to an agreement, and we are comfortable with that in  
4 terms of what is being proposed to Your Honor along  
5 those lines.

6           So I just wanted to make sure you're aware of  
7 that as well.

8           THE COURT: Thank you. I appreciate that.

9           I do want to just confirm with you  
10 separately, you think that approval is appropriate  
11 under both (b)(2) and (b)(3)?

12          MS. SUMNER: I do, Your Honor.

13          THE COURT: All right. Well, I think those  
14 are the -- yes.

15          MR. BENNETT: I do have one other point as I  
16 think about this, Judge.

17          THE COURT: All right.

18          Thank you, Ms. Sumner.

19          MR. BENNETT: In regard to Your Honor's  
20 questions about practice restrictions, and as I'm  
21 thinking about this, I made an additional commitment  
22 to Equifax, we did, our firms, that we would not  
23 initiate a new class action against Equifax in, I  
24 guess, a roughly 12-month period. A big part of that  
25 is because of class action fatigue. Equifax -- we've



1 negotiated *Soutter*. We've negotiated settlements in a  
2 number of other cases that solved problems and paid  
3 consumers money and paid us fees. So that's to be  
4 above board. That was expressly discussed.

5 THE COURT: That's actually in your papers, I  
6 think. It's part of the reason I was asking about  
7 individual claims.

8 All right. Okay.

9 MS. SUMNER: Thank you, Your Honor.

10 THE COURT: Thank you all very much.

11 All right. Well, I have reviewed your  
12 proposed settlement class, and I do make the finding  
13 that the proposed settlement is fair and reasonable  
14 and accurate and meets the requirements of Rule 23.

15 This class, defined as all consumers in the  
16 United States who within two years preceding the  
17 filing of this action until the date of the  
18 preliminary approval received a credit file disclosure  
19 from Equifax containing a public record, meets the  
20 requirements under Rule 23 both ultimately (b)(2) and  
21 (b)(3).

22 First, with respect to the 23(a)  
23 prerequisites, it is the case that this class is so  
24 numerous that joinder of all members is impracticable.  
25 The estimate is that it could be approximately

1 2 million individuals and that the range, as  
2 articulated today, would be 1 million to 2.5 million.  
3 Certainly the joinder or individual cases with respect  
4 to that is not practicable anywhere with respect to  
5 the number of citizens or folks who have received  
6 their credit reports are highly numerous. I think the  
7 technical term used by counsel was "gigantic." I  
8 think my children would say "ginormous," but certainly  
9 it meets the numerosity requirement under Rule 23.

10 The plaintiffs certainly have the requisite  
11 commonality factors. They are in receipt of a former  
12 policy and procedure or proposed former policy and  
13 procedure whereby Equifax did not identify the vendor  
14 through which it got information. It is the case, and  
15 it's clear on the record, that Equifax is not  
16 admitting that this necessarily violated FCRA, but  
17 this is a settlement that suggests that they will  
18 change their practices.

19 So these consumers did get a credit file  
20 disclosure from Equifax. They requested it. It was  
21 disclosed, and the vendor was not in it. So that  
22 meets both the commonality and the typicality  
23 requirements under 23(a).

24 Certainly with respect to adequacy, it is the  
25 case that the unity and the confidence of counsel are

1 certainly explained more than adequately within the  
2 paper filings. Certainly this court has seen these  
3 counsel on numerous occasions, and the class  
4 representatives not only represent the claim  
5 appropriately, but they understand and have accepted  
6 the obligations that are imposed upon them, and they  
7 have adequately represented the interests of the  
8 putative class as have the counsel who have worked  
9 with them.

10 I do want to ask a question which I forgot to  
11 ask. Do the named plaintiffs receive any kind of  
12 bonus payment?

13 MR. BENNETT: The agreement is that we can  
14 ask the Court in fairness for an amount up to \$5,000  
15 which would be paid, of course, by Equifax.

16 THE COURT: That may have been in your  
17 papers. I know it's the norm, and I failed to make a  
18 note about it when reading it.

19 All right. So with respect to the class  
20 under 23(b)(3) and 23(b)(2), I do think that the  
21 proposed approval of both classes are appropriate in  
22 this case.

23 Under 23(b)(3), the common questions of law  
24 or fact predominate over questions with respect to  
25 individual members. The predominance here involves

1 whether Equifax failed to clearly and accurately  
2 disclose the source of the third party vendor as the  
3 source of the public records. The issue would be  
4 whether or not that failure to disclose violated FCRA  
5 and whether willfulness was involved.

6           So it is the case with respect to  
7 predominance, that is clearly met under 23(b)(3). The  
8 class action would be superior to any other means for  
9 fairly and efficiently adjudicating the controversy.  
10 It is the case that certainly individual lawsuits for  
11 a small statutory penalty would be costly and  
12 duplicative, but the real issue here is that the class  
13 claims outweigh the import of the individual claims  
14 with respect to what is the issue before the Court  
15 given the nature of the individual claims that would  
16 be brought.

17           With respect to Rule 23(b)(2), the  
18 certification would be proper if Equifax acted or  
19 failed to act in a manner that affected the class as a  
20 whole, and certification would be proper if the  
21 members of the proposed class would benefit from  
22 injunctive relief.

23           Again, the issue that is common to all of  
24 these millions of potential plaintiffs involve this  
25 failure to identify the vendor and whether or not that

1 is an issue under FCRA, and certainly this is a sea  
2 change with respect to disclosure by Equifax, and an  
3 entirely new business practice that would involve  
4 listing the name and contact information of the third  
5 party vendor on reports. I'm right about that,  
6 correct? It's not just the name. It's that the  
7 consumer can know how to contact LexisNexis.

8 MS. SUMNER: That's correct, Your Honor.

9 THE COURT: Which is a significant benefit  
10 with respect to what consumers would receive from  
11 Equifax. And Equifax under the proposed settlement  
12 would forward disputes regarding public record  
13 information to the vendor who supplied it. This  
14 clearly is a significant agreement reached as far as  
15 what consumers would have available to them. And  
16 while there is no direct monetary payment, there is  
17 the equivalent offer of 18 months of credit  
18 monitoring, which is worth \$270 per consumer, and  
19 there is no waiver of individual claims.

20 I do think this balances the risks that both  
21 parties faced with respect to potential litigation.  
22 Certainly it is the case that Equifax has not conceded  
23 the FCRA violation, and it was prepared to move  
24 forward with litigation, and there was risk to the  
25 plaintiffs especially as to damages. Because of the

1 causation issues, it would be difficult for plaintiffs  
2 to prove individual damages. The notice in this case  
3 is expensive, and a meaningful cash settlement, given  
4 the amount of money that would be at issue, as  
5 articulated by plaintiff's counsel here, would be  
6 difficult, if not impossible, to effectuate.

7 Certainly Equifax has faced the issue of  
8 whether or not it could lose a certification  
9 challenge. It could face damages at trial. And both  
10 parties face the issue of the probability of appeals,  
11 the uncertainty of outcome, and the expense of formal  
12 discovery. And it is clear that these parties have  
13 engaged in significant informal discovery given the  
14 nature of the settlement that involves a change of the  
15 business practice by a major company.

16 So as I look to what are commonly called the  
17 *Jiffy Lube* factors, the posture of the case at  
18 settlement with respect to the fairness of the  
19 outcome, there has been significant work that was  
20 conducted on the case. There is ongoing litigation  
21 elsewhere in the country which doesn't pertain to this  
22 case, but it does go to the risk factors as to both  
23 parties at issue here.

24 There has been a significant exchange of  
25 informal discovery, which is evident by the nature of

1 the settlement that is proposed. There has been a  
2 thorough investigation of facts and claims also  
3 evident via the specificity with respect that the  
4 parties represent, the number of potential plaintiffs,  
5 the type of notice that's discussed, and the outcome  
6 of the case that is proposed. There has been a series  
7 of mediations.

8           There has been three with Judge Birch, is  
9 that correct, or two?

10           MR. BENNETT: Two in person, I believe. It  
11 feels like eight, Judge.

12           THE COURT: That's fine. I wrote down three  
13 different dates, but there have been at least two  
14 mediations with Judge Birch, who is a retired judge of  
15 the Court of Appeals for the Eleventh Circuit and is  
16 known to this court as having extensive expertise in  
17 not just mediation but specifically this type of  
18 mediation. I'm sure he is expert in other types of  
19 mediation. But this court has individual experience  
20 with Judge Birch in consumer credit cases, and it is  
21 clear that these parties engaged a mediator who would  
22 work hard with them and require hard work of them.

23           The nature of the injunctive relief is  
24 groundbreaking, as articulated by both counsel here,  
25 and indicates a significant amount of work on both

1 sides. And the fact that there is not an individual  
2 waiver of damage claims certainly speaks volumes to  
3 the fairness of the proposed settlement whether or not  
4 Equifax believes there will be a lot of claims. It is  
5 the case that they are taking that risk. And that is  
6 the product of clearly very hard work, and counsel on  
7 both sides that are deeply experienced in this area of  
8 litigation and who do numerous consumer actions, both  
9 in this court and nationally. So the fairness is  
10 immensely evident with respect to the outcome that is  
11 proposed in this case.

12 With respect to the adequacy factors under  
13 the *Jiffy Lube* analysis, Equifax has disputed the  
14 claims from the date the case was filed and continues  
15 today to state that it's not admitting or suggesting  
16 necessarily that this is a violation of FCRA, which is  
17 one of the benefits of engaging in a class settlement.  
18 And, as indicated with respect to the risk that the  
19 parties have faced, clearly proving damages and  
20 causation is a major risk as defendants could lose  
21 certification and have to face damages to a class that  
22 is huge.

23 The risk of individual lawsuits, the  
24 probability of appeals, the uncertainty of the outcome  
25 and the immense cost of formal discovery all indicate



1 that the strength of the plaintiffs' case on the  
2 merits is strong enough and the risks are high enough  
3 that this certainly is an adequate outcome given the  
4 nature of the case.

5 The existence of any difficulties approved  
6 for strong defenses that plaintiffs likely would  
7 encounter if the case went to trial I think I've just  
8 addressed.

9 The anticipated duration and expense of  
10 additional litigation is also, I think, addressed by  
11 my comments earlier, including potential appeals and  
12 formal discovery. Obviously, any class involves two  
13 phases of litigation and possibly interlocutory  
14 appeals, all of which go toward the adequacy of the  
15 settlement that's proposed to this case.

16 In looking at the solvency of Equifax and the  
17 likelihood of recovery on litigated judgment, this has  
18 been addressed with respect to the nature of the size  
19 of the class here. Obviously, the potential recovery  
20 could be 200 million to 2 billion, and the papers are  
21 explicit as to the amount of money that this Equifax  
22 entity would have available to it. And the question  
23 is quite high as to whether or not they could have  
24 paid a meaningful cash settlement to a class this  
25 size. So certainly the notion of this change of

1 business practice and credit monitoring without a  
2 waiver of an individual claim is exactly the type of  
3 outcome the class action mechanism is meant to put  
4 forward in cases like these.

5 I can't really make a finding yet as to the  
6 degree of opposition to the settlement, but it is the  
7 case that individual notice will be provided, and it  
8 is an opt out class meaning that individuals can  
9 choose to opt out, and, obviously, they will have an  
10 opportunity to object under the class process.

11 With respect to the notice that is proposed,  
12 obviously the parties have put before me the actual  
13 notice itself. It is adequate under 23(c)(2)(b) and  
14 (e)(1) and involves direct notice. The process is  
15 detailed and specific.

16 Individual notice will go to each member by  
17 email or U.S. mail. Class counsel has indicated they  
18 will set up a website. They are establishing a  
19 process under which email addresses will be gathered  
20 and put forward. Having reviewed the opt out notice,  
21 I find that process sufficient also including that  
22 individuals can object.

23 The choice of administrator was clearly made  
24 thoughtfully. The fact that Equifax has undertaken  
25 the process of paying for the administrator is a

1 significant aspect of the fairness and adequacy  
2 findings that I have made, and the release that was  
3 involved in this case is narrow. So I am prepared to  
4 make the finding that this proposed settlement is fair  
5 and reasonable and accurate.

6 So, obviously, we need to talk about issues  
7 of scheduling the fairness hearing. Obviously, I need  
8 to appoint class counsel and approve the manner of  
9 notice, all of which I am prepared to do, and certify  
10 the settlement class.

11 I do need to talk to you about timeframes for  
12 the fairness hearing. I've reviewed your order. The  
13 one issue would be adding the (b)(2) to the (b)(3).  
14 That is in paragraph two of the proposed settlement  
15 order, and I guess I would need to hear from you all  
16 about other dates and information.

17 MR. BENNETT: Yes, Your Honor. Shall I speak  
18 from here?

19 THE COURT: If you could approach, that would  
20 be good.

21 MR. BENNETT: Your Honor, first with respect  
22 to the date, the Court has to consider both the  
23 practical, the ability to get notice. Some will get  
24 kicked back. We will be sending new notices. There's  
25 a process to send paper mail, and then to provide an

1 ample opportunity for individuals to object and make  
2 their decision as they need to.

3           Then there's the legal concern, which under  
4 the Class Action Fairness Act requires that the Court  
5 not enter final approval on a class settlement until  
6 the relevant government authorities have been notified  
7 at least 90 days prior, which puts us to a point --  
8 it's actually 90 days from when they receive their  
9 notice, which has already occurred, but a 90-day  
10 period from today would put us, assuming we started  
11 that today, would put us in the middle of September,  
12 which from the plaintiffs' standpoint I believe is  
13 appropriate. Ninety days is practical and it  
14 satisfies the Class Action Fairness Act, more than  
15 does, because the CAFA notice has already happened.

16           With respect to the order, Your Honor, we  
17 would propose the plaintiffs work with defendants to  
18 get a final proposed order back to Your Honor. We  
19 would add the date that Your Honor orders as the final  
20 fairness hearing. We would also add the class  
21 administrator that was negotiated after that paper was  
22 first drafted to paragraph 6 and the 23(b)(2) language  
23 based on Your Honor's ruling from the bench as  
24 paragraph 5(f). Those last two on page three of the  
25 proposed preliminary approval order.

1           My opponent might have their own issues, but  
2   that's what I would suggest.

3           THE COURT: All right.

4           MS. SUMNER: Your Honor, that's fine. I'm  
5   perfectly willing now to work with counsel to provide  
6   a revised proposed order to put that in final form.  
7   It also gives us an opportunity to look at our  
8   schedules. I feel a little hamstrung not having my  
9   cell phone with me and the ability to look at my  
10  calendar. So we could get back with you with dates.

11          THE COURT: All right. Please have a seat.  
12  Thank you.

13          I'm sorry. There is a process through which  
14  you can bring your cell phone in, and I'm sorry that  
15  we weren't clear about articulating that to you.

16          So I can tell you about dates that I have  
17  available in September, and then maybe you all can try  
18  to work from those.

19          I have a series of trials already scheduled  
20  in September. I think that I would have available  
21  September 21 and the morning of the 23rd, and I can  
22  work with you on the week of the 26th. So hopefully  
23  that's enough dates that you might be able to find  
24  some time.

25          MR. BENNETT: I believe so, Judge. That

1 should probably be fine, Your Honor.

2 THE COURT: Okay. In October, I think the  
3 best day of the next week would be the 7th if you all  
4 have to go in to October, but you obviously can call  
5 my clerk and find out any other times, but hopefully  
6 that will be enough. All right?

7 Is there anything else I need to address for  
8 you all today?

9 MS. SUMNER: Not from the defendant, Your  
10 Honor.

11 MR. BENNETT: I would note that Your Honor  
12 has a George Mason, or whatever we're now calling  
13 them, law intern. But we call ourselves the Yale of  
14 Arlington. I assume that you recognize the power that  
15 a George Mason law student has. The scrappiness that  
16 we're stuck with.

17 THE COURT: They are young, hungry and  
18 scrappy, right? Anybody seen *Hampton* like I have?

19 Ms. Sumner, do you want to speak on behalf of  
20 your own school? You don't have to.

21 MS. SUMNER: Vanderbilt. I'm disappointed,  
22 Your Honor. There is no one here from Vanderbilt  
23 today.

24 THE COURT: I will say all schools here are  
25 extremely well represented, as is usually the case in

1 this court. So I do appreciate your time. I will  
2 tell the interns who are here that this level of hard  
3 fought and highly expert class litigation is rare  
4 around the country, and especially well done in our  
5 jurisdiction.

6 So what you're seeing is the upshot of a huge  
7 amount of work, and you should watch the efforts of  
8 these kinds of lawyers closely and try to emulate it.

9 So thank you all very much for your time. I  
10 appreciate it.

11 MS. SUMNER: Thank you, Your Honor.

12 MR. BENNETT: Thank you.

13 (The proceedings were adjourned at 11:40 a.m.)  
14

15 I, Diane J. Daffron, certify that the foregoing is  
16 a correct transcript from the record of proceedings  
17 in the above-entitled matter.

18 /s/

19 \_\_\_\_\_  
20 DIANE J. DAFFRON, RPR, CCR

\_\_\_\_\_  
DATE

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